Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

FRANK O'BANNON, in his official capacity as Governor of Indiana,

Petitioner,

v.

INDIANA CIVIL LIBERTIES UNION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Establishment Clause permits the government to display the Ten Commandments to memorialize the role the Commandments have played in the development of the rule of law and of the American legal system.

PARTIES TO THE PROCEEDINGS

The plaintiffs are the Indiana Civil Liberties Union, Joan Laskowski, Alice Bennett, James A. Tanford, Steven Schroeder, Patrice Muumba Abduallah, Reverend Kevin Armstrong, Rabbi Eric Bram, and Dr. Edgar Towne. The sole defendant is Frank O'Bannon in his official capacity as Governor of Indiana.

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PETITION FOR A WRIT OF CERTIORARI

Indiana Governor Frank O'Bannon respectfully petitions for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Seventh Circuit affirming the preliminary injunction of the United States District Court for the Southern District of Indiana.

OPINIONS BELOW

The Seventh Circuit's opinion is published at 259 F.3d 766 (7th Cir. 2001) and is reprinted in the appendix at App. 1a-27a. The Order Granting Preliminary Injunction of the United States District Court for the Southern District of Indiana is published at 110 F. Supp. 2d 842 (S.D. Ind. 2000), and is reprinted at App. 28a-61a.

JURISDICTION

The Court of Appeals issued its opinion and judgment on July 27, 2001. The Seventh Circuit denied Petitioner's timely filed Petition for Rehearing *En Banc* on October 2, 2001. App. 62a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. Section 1 of the Fourteenth Amendment provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of

> law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1.

STATEMENT

The Ten Commandments have played a critical role in the development of Western Civilization generally and in the development of the American legal tradition in particular. *See, e.g., Stone v. Graham*, 449 U.S. 39, 45 (1980) (Rehnquist, J., dissenting) ("It is equally undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World."); *City of Elkhart v. Books*, 121 S. Ct. 2209, 2211-12 (2001) (Rehnquist, C.J., dissenting from denial of certiorari) (stating that the Commandments "have made a substantial contribution to our secular legal codes" and recognizing that Elkhart's monument "simply reflects the Ten Commandments' role in the development of our legal system"); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 652-53 (1989) (Stevens, J., concurring in part and dissenting in part) (stating that the frieze on the south wall of the Court's courtroom depicting Moses holding the Ten Commandments "signals respect not for great proselytizers but for great lawgivers").[1] This case asks whether governments may display the Ten Commandments to memorialize that crucial historical role.

Last term the Court, over a dissent joined by three justices, denied certiorari in another government Ten Com-

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[1] *See also, e.g.*, Russell Kirk, *The Roots of American Order* 29, 45 (1974) (writing that, "from Israel, even more than from the Roman jurisconsults, America inherited an understanding of the sanctity of law" and that "Revelation in the Old Testament . . . is the form of revealed truth upon which American order depends") (footnote omitted).

mandments display case, *City of Elkhart*, 121 S. Ct. at 2210 (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting from the denial of certiorari). But many other state and local governments across the country display (or wish to display) the Ten Commandments. Despite repeated litigation of the issue, the lower courts (including the courts of appeals) continue to be divided on whether such displays are permissible. *See, e.g.*, App. 38a (noting "the profusion and confusion reflected in the case law and in Supreme Court precedent"). And, unlike the monument in *City of Elkhart*, the monument in this case was specifically designed to include other historical texts in order to display the Commandments as part of a broader display of historical texts having an influence on the laws of the State of Indiana, and on the Nation as a whole. Certiorari is therefore warranted to resolve the lower courts' conflicts on the important and recurring issue of when the government may display the Ten Commandments.

1. On March 14, 2000, Indiana Governor Frank O'Bannon accepted for display on the Indiana Statehouse lawn a monument donated by the Indiana Limestone Institute featuring the Ten Commandments, the Bill of Rights, and the Preamble to the 1851 Indiana Constitution.[2] App. 2a, 3a, 8a. The monument, to be located among numerous other historical markers, was intended to replace another Ten Commandments monument donated by the Fraternal Order of Eagles in 1958 that sat on the Statehouse lawn until it was

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[2] The Preamble to the 1851 Indiana Constitution states:

> To the end, that justice be established, public order maintained, and liberty perpetuated: We the People of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution.

App. 4a. The Preamble is not identified as such on the monument. *Id.*

vandalized in 1991. App. 2a, 4a. Respondent Stephen Schroeder was convicted of spray-painting, breaking, and toppling the prior monument. App. 68a; *see also* Susan Dillman, *Decalogue Display Under Challenge*, South Bend Tribune, May 19, 2000, at D1, *available at* 2000 WL 20362744.

The new monument has four sides and is seven feet tall, six feet, seven inches wide, and four feet, seven inches deep. App. 3a. The Ten Commandments and Bill of Rights each occupies one of the larger sides, with the top arched in the form traditionally used to depict the stone tablets Moses carried from the top of Mount Sinai. App. 3a, 4a. The Preamble to the Indiana Constitution is printed on one of the smaller sides. App. 4a. The other smaller side of the new monument states: "Gift of the Indiana Limestone Industry—2000 A.D. This Monument replaces one donated by the Aeries and Auxiliaries of the Indiana Fraternal Order of the Eagles on October 25, 1958." App. 4a.

The portion of the Indiana Statehouse lawn where the monument is to be placed is about 1.93 acres in size. App. 64a. It features twelve other historical markers, including two monuments honoring the National Road (U.S. 40, which formerly ran adjacent to the Statehouse lawn), a monument honoring Indiana women, two friezes depicting Civil War scenes, a marker showcasing the history of the Statehouse, statues of Christopher Columbus, George Washington, Robert Dale Owen, a coal miner, Vice-President and Governor Thomas A. Hendricks and Governor Oliver H.P. Morton. App. 5a, 22a, 30a. The Statehouse lawn also has seven dedicated trees. App. 5a.

When he accepted the monument, Governor O'Bannon remarked that the new monument was intended to "be an integral part of the Statehouse setting, which honors the history of our state and nation." App. 8a, 72a. The prior

monument, said the Governor, "stood on the Statehouse lawn as a reminder of some of our nation's core values." App. 71a. On the new monument, he said, the Ten Commandments "will stand alongside the abiding principles of our form of government, especially its protections of individual rights. . . . They're ideals we all need to be reminded of from time to time." *Id.*

2. In May 2000, plaintiffs filed this action under 42 U.S.C. § 1983 alleging that the Governor's acceptance of the new monument and his plan to place it on Statehouse grounds violated the Establishment Clause. App. 5a. Because the plaintiffs alleged a violation of the U.S. Constitution and section 1983, the district court had federal question jurisdiction under 28 U.S.C. § 1331. Plaintiffs sought a preliminary injunction against displaying the monument, and on July 28, 2000, the district court entered a preliminary injunction prohibiting the Governor from displaying the monument on the Statehouse lawn. App. 28a.

Applying the general framework used in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and more particularly the endorsement test articulated in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring), the district court examined "'whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.'" App. 48a (citation omitted). The district court concluded that reasonable observers would view the monument as a state endorsement of religion for two central reasons: (1) the text of the Ten Commandments is too isolated by appearing alone on one of the two wider surfaces of the monument; and (2) there was no "explanatory marker" linking the discrete texts appearing on the monument. App. 55a-56a. The district court also concluded that, even if passersby could not read the monument without approaching it, the monument's tablet

shape would convey its religious character from a distance. App. 57a.

Further, although it acknowledged that the government's secular purpose "need not be the exclusive purpose" behind the monument (App. 40a), the district court necessarily found that, in light of the monument's design, Governor O'Bannon's stated secular purpose was a disingenuous sham. *Compare id.* with App. 47a.

3. A divided panel of the Seventh Circuit affirmed the preliminary injunction. Applying the purpose and effect prongs of the Establishment Clause test provided in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court, notwithstanding the Governor's statement that the monument was intended to "be an integral part of the Statehouse setting, which honors the history of our state and our nation" (App. 72a), held that "[t]he Ten Commandments is still an inherently religious text, and we conclude that the State has not articulated a valid secular justification for planning to erect the monument." App. 9a. The court reasoned that the Ten Commandments "are historical, secular 'core values' only to those who adhere to them" and that the monument therefore reflected a religious purpose. *Id.* "Moreover," the court ruled, "the monument's physical design belies any suggestion that these texts are presented as a whole to remind viewers of the core values and legal ideals of our nation." *Id.* [3]

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[3] Though the Seventh Circuit affirmed the district court "pending resolution on the merits" (App. 13a), the court also bluntly stated that "we are hard-pressed to believe that a trial on the merits will support a different conclusion." App. 12a-13a (citation omitted). For this reason, and because the case was presented to the district court mostly on a stipulated record (App. 28a), this case is as ready for review by the Court as if final judgment had been entered. *Cf. Ashcroft v. ACLU*, 121 S. Ct. 1997 (2001) (granting certiorari to review case at preliminary injunction

In addition, the court stated that "[t]he permanence, content, design, and context of the monument amounts to the endorsement of religion by the state." App. 12a. The court recognized that "the grounds house other statues and monuments" and indeed "are somewhat akin to a museum." App. 10a. Nonetheless, the court thought that the monument would convey the message of endorsement of religion because, among other reasons, it is tablet-shaped and the Commandments are inscribed in one-inch capital letters while the Bill of Rights (owing to its lengthier text) is inscribed in five-eighths-inch capital letters on the opposite side. App. 11a.

The court also was troubled that the side of the monument featuring the Ten Commandments was not "visually connected" to the sides featuring the Bill of Rights and the 1851 Indiana Preamble, and thus that a reasonable observer "would be hard-pressed to make any analytical connection between the texts . . . ." App. 11a-12a. Yet at the same time the court also worried that "an observer who views the entire monument may reasonably believe that it impermissibly links religion and law since the Bill of Rights and the 1851 Preamble are near the sacred text. This would signal that the state approved of such a link, and was sending a message of endorsement." App. 12a.

4. In dissent, Judge Coffey criticized the majority for "seem[ing] to go out of its way to second guess Governor O'Bannon's stated purpose for the proposed monument in an attempt to discredit that purpose." App. 20a. He stated that "[s]imply because some religious meaning is conveyed by a monument does not destroy a state's valid secular purposes for its display." App. 16a (citations omitted).

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stage); *City of Indianapolis v. Edmond*, 528 U.S. 1153 (same), *aff'd*, 531 U.S. 32 (2000).

In Judge Coffey's view, the monument's presentation of the Ten Commandments with the Bill of Rights and the 1851 Preamble distinguishes this monument. By including three historical texts, the monument "presents three important steps in the development of the law as they affect 1) the people of the world; 2) the citizens of the United States; and 3) the citizens of the State of Indiana." App. 18a. Accordingly, to Judge Coffey, the overall message of the monument is secular, not religious. *See* App. 20a-23a.

Furthermore, according to Judge Coffey, "the layout of the monuments that adorn the Statehouse lawn also serves to diminish any perceived endorsement of religion . . . ." App. 22a. With twelve other monuments, busts, and friezes, "the Statehouse lawn is an area dedicated to monuments that pay due homage to both the state's and the nation's history that serves to situate the monument in an appropriate *cultural* and *historical* context." *Id.* This context, in Judge Coffey's view, "only serves to reinforce the secular nature of the monument in question as set forth and clearly delineated in Governor O'Bannon's press release." App. 23a.

In sum, Judge Coffey reasoned:

> If the Ten Commandments properly convey a secular message when adorning the wall of a Federal Courtroom, I cannot understand how the State of Indiana's proposed placement of the three-sided monument amidst twelve other secular symbols of the nation's legal and cultural history fails to similarly convey a secular message.

App. 17a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW EXACERBATES A CONFLICT AMONG THE SEVENTH CIRCUIT, THE TENTH CIRCUIT AND THE COLORADO SUPREME COURT

The Seventh Circuit's decision directly conflicts with holdings of the Tenth Circuit and the Colorado Supreme Court that the Establishment Clause permits government to display the Ten Commandments.

In *Anderson v. Salt Lake City Corp.* 475 F.2d 29 (10th Cir. 1973), the court upheld a city's display on courthouse grounds of a Ten Commandments monument.[4] *Anderson* recognized that "the Decalogue is at once religious and secular" and that "an ecclesiastical background does not necessarily mean that the Decalogue is primarily religious in character—it also has substantial secular attributes." *Id.* at 33. *Anderson* also stated that the display was "a depiction of a historically important monument with both secular and sectarian effects." *Id.* at 34. Indeed, *Anderson* found the Ten Commandments monument—which, unlike the monument at issue here, included no other historical documents—to be "primarily secular." *Id.*

This ruling conflicts with the Seventh Circuit's holding that "the Ten Commandments is . . . an inherently religious text" (App. 9a) and that the inclusion of the Bill of Rights

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[4] *Anderson* remains the controlling Tenth Circuit authority concerning government displays of the Ten Commandments. *See Summum v. City of Ogden*, 152 F. Supp. 2d 1286, 1294 (D. Utah 2001); *see also Books v. City of Elkhart*, 235 F.3d 292, 318 & n.4 (7th Cir. 2000) (Manion, J., dissenting) (relying on *Anderson* and explaining why *Anderson*'s holding is not affected by *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam)), *cert. denied*, 121 S. Ct. 2209 (2001).

and the 1851 Preamble along with the Ten Commandments would infect those secular texts with a religious aura rather than emphasize the overall secular nature of the monument. App. 12a. This ruling cannot be squared with *Anderson*'s holding that the Ten Commandments is a secular "foundation for law" that merely happens to "reflect the religious nature of an ancient era," that the government may display. *Anderson*, 475 F.2d at 34.[5]

The Seventh Circuit's decision also conflicts with the decision of the Colorado Supreme Court in *State of Colorado v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013 (Colo. 1995) (en banc), which approved a Ten Commandments monument on the grounds of the Colorado State Capitol. There, the court was persuaded that the Ten Commandments convey secular history because they have "served over time as a basis for our natural law" and the moral standards they articulate "have played a large role in the development of the common law and have formed a part of the moral background for the adoption of the national constitution." *Id.* at 1024 (recounting undisputed testimony). The Seventh Circuit, however, concluded that the Ten Commandments are "inherently religious" and therefore do not reasonably communicate a secular historical message (App. 9a), a ruling that cannot be squared with *Colorado*.

Indeed, *Colorado* embraced the government's secular role in communicating the complete history of our nation—even the religious part: "[D]ue to our past it would be inaccurate to ignore a history that includes religion." *Colorado*, 898 P.2d at 1025. Thus, while the Seventh Circuit intimated that the government could post the Ten

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[5] *See also Suhre v. Haywood County*, 55 F. Supp. 2d 384, 397 (W.D. N.C. 1999) (upholding a courtroom display featuring the Ten Commandments, Lady Justice and the flags of North Carolina and the United States because it "touts nothing more than an effort to recall the origin of modern law, by reference to an ancient source of law and justice").

Commandments only if it first excised references to God or religion (App. 9a), the Colorado Supreme Court concluded that barring a government display of the Ten Commandments merely because of such references would inappropriately require "callous indifference" to religious groups and prefer "non-believers over believers." *See Colorado*, 898 P.2d at 1026.

And unlike the Seventh Circuit, *compare* App. 10a-13a, *Colorado* also found that the Ten Commandments monument communicated secular history because it was displayed among other monuments representing "a cornucopia of different cultural events and experiences that make up the history of our nation and reflect upon a history that is also Colorado." *Colorado*, 898 P.2d at 1025. The Ten Commandments monument itself, while it featured no other historical texts, included Christian, Jewish, and Egyptian symbols, as well as a bald eagle and an American flag. These features, *Colorado* ruled, "sufficiently neutralize [the Ten Commandments'] religious character resulting in neither an endorsement nor a disapproval of religion." *Id.* at 1019.

The decision below is thus fundamentally in conflict with the decisions in *Anderson* and *Colorado*. The Court should grant certiorari to resolve this conflict.

II. THE PERMISSIBILITY OF GOVERNMENT TEN COMMANDMENTS DISPLAYS IS AN IMPORTANT AND RECURRING ISSUE

Several challenges to government Ten Commandments displays are pending in many jurisdictions, and all will benefit from guidance from the Court. *See Adland v. Russ*, 107 F.Supp. 2d 782 (E.D. Ky. 2000), *appeal pending*, No. 00-6139 (6th Cir. argued Nov. 2, 2001); *Doe v. Harlan County*, 145 F.Supp. 2d 845 (E.D. Ky. 2001), *appeal pending*, No. 01-5935 (6th Cir. filed July 26, 2001); *ACLU v.*

McCreary County, 145 F.Supp. 2d 845 (E.D. Ky. 2001), *appeal pending*, No. 01-5935 (6th Cir. filed July 26, 2001); *ACLU v. Pulaski County*, 145 F.Supp. 2d 845 (E.D. Ky. 2001), *appeal pending*, No. 01-5935 (6th Cir. filed July 26, 2001); *ACLU v. Garrard County*, No. 01-CV-481 (E.D. Ky. filed Nov. 27, 2001); *ACLU v. Grayson County*, No. 01-CV-202 (W.D. Ky. filed Nov. 27, 2001); *ACLU v. Mercer County*, No. 01-CV-480 (E.D. Ky. filed Nov. 27, 2001); *ACLU v. Rowan County*, No. 01-CV-220 (E.D. Ky. filed Nov. 27, 2001); *Hoffman v. City of Mishawaka*, No. 3:01-CV-00780 (N.D. Ind. filed Nov. 2, 2001); *Glassroth v. Moore*, No. 01-CV-1268 (M.D. Ala. filed Oct. 30, 2001); *Freethought Society v. Chester County*, No. 01-CV-5244 (E.D. Pa. filed Oct. 16, 2001); *ACLU v. Plattsmouth*, No. 4:01-CV-3109 (D. Neb. filed May 17, 2001); *Christian v. City of Grand Junction*, No. 01-CV-685 (D. Colo. filed Apr. 16, 2001); *Modrovich v. Allegheny County*, No. 2:01-CV-531 (W.D. Pa. filed Mar. 20, 2001); *ACLU of Ohio v. Ashbrook, et al.*, No. 1:01-CV-556 (N.D. Ohio filed Mar. 8, 2001); *King v. Richmond County*, No. 00-CV-100 (S.D. Ga. filed May 12, 2000); *Baker v. Adams County*, No. C-1-99-094 (S.D. Ohio filed Feb. 2, 1999).

In addition, there are hundreds of government Ten Commandments displays across the country. *See Books v. City of Elkhart*, 235 F.3d 292, 294-95 (7th Cir. 2000) (describing the efforts of the Fraternal Order of Eagles to donate monuments of the Ten Commandments to be displayed on government property across the country), *cert. denied*, 121 S. Ct. 2209 (2001). Given the frequency with which the ACLU's chapters have sued to enjoin these omnipresent displays, it is reasonable to expect that many more lawsuits will follow.

Government interest in displaying the Ten Commandments only continues to grow. At least five states have enacted legislation authorizing displays of the Ten

Commandments in historical contexts on public grounds or in public schools. *See* Ind. Code §§ 4-20.5-21-2 (West Supp. 2001) and 36-1-16-2 (West Supp. 2001); Ky. Rev. Stat. § 158.195 (Michie 2001); N.M. Stat. §§ 22-15-15 to 22-15-20 (Michie 2001); N.C. Gen. Stat. § 115C-81(g)(3b) (1999); and S.D. Codified Laws § 13-24-17.1 (Michie Supp. 2001). Furthermore, in the last two years, legislatures in Alabama, Colorado, Florida, Georgia, Illinois, Maine, Michigan, Mississippi, Missouri, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania and Tennessee all reportedly considered taking steps to support, permit or require government or public school displays of the Ten Commandments. Hanna Rosin, William Claiborne, *Taking the Commandments Public; Indiana Passes Bill Allowing Display in Schools, Other Government Facilities*, The Washington Post, Feb. 8, 2000, at A3; Americans United For Separation of Church and State: State Legislative Update For The 2001 Sessions, *at* http://www.au.org/states.htm (last visited December 26, 2001). Such legislative approaches are part of a more general movement to post the Ten Commandments in government buildings and public schools. Rosin and Claiborne, *supra*.

Similarly, Congress has recently considered legislation endorsing government displays of the Ten Commandments. In 1999, the House of Representatives passed the Ten Commandments Defense Act, which would have recognized the abilities of state and local governments to post the Ten Commandments in public places. H.R. 1501, 106th Cong. § 1202 (1999). The larger bill of which the Act was a part died thereafter, but the House's passage of the Ten Commandments Defense Act demonstrates the growing importance of the issue to many public officials.

In sum, a decision from the Court addressing when governments may display the Ten Commandments is of great and growing importance.

III. THE DECISION BELOW IS WRONG

A. The Court Misapplied The Endorsement Test

The Seventh Circuit's decision would prohibit nearly any government display of the Ten Commandments and accordingly is at odds with *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

Lynch held that government may display a crèche on public property while depicting the historical origins of Christmas as a National Holiday. *Lynch*, 465 U.S. at 680, 687. Similarly, *Allegheny* approved a display of a Christmas tree and a Menorah, erected near a sign saluting liberty, in front of a city-county building. *See* 492 U.S. at 578, 621. The Menorah-Christmas tree presentation—unlike the stand-alone crèche that *Allegheny* invalidated—conveyed messages that were sufficiently secular to avoid any endorsement of the Christian and Jewish faiths or any establishment of religion. *Id.* at 616 (opinion of Blackmun, J.); *see also id.* at 635 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Rather than being exclusively, or even "inherently" religious, the Ten Commandments is at least as (if not more) susceptible to a historic, secular presentation as a crèche, a Christmas tree, and a Menorah. While it invalidated a law requiring the Ten Commandments to be posted in schoolrooms, *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), did not foreclose government displays of the Ten Commandments in contexts that better communicated their historical, rather than religious, significance. The constitutional problem in *Stone*, which must be understood in the context of inculcating school children, was that the Commandments were posted alone on a schoolroom wall, a

circumstance that induced students to meditate on them during the school day. *See Stone*, 449 U.S. at 42; *see also City of Elkhart v. Books*, 121 S. Ct. 2209, 2211 (2001) (Rehnquist, C.J., dissenting from denial of certiorari). But *Stone* expressly recognized that the Ten Commandments "may constitutionally be used in an appropriate study of history, civilization, [or] ethics . . . ." *Stone*, 449 U.S. at 42. And *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987), recognized that *Stone* "did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization."

The Seventh Circuit, however, erroneously ruled that the Ten Commandments is "inherently religious" to the exclusion of any secular significance, despite the presence of other historical texts and monuments. It held, contrary to the rationales of *Lynch* and *Allegheny*, that the presence of secular texts accompanying the monument—the Bill of Rights and the 1851 Preamble—underscores religious endorsement. App. 12a. Under that view, *no* Ten Commandments display on the Statehouse lawn would pass muster. Any attempt to emphasize the Commandments' historical importance by displaying them with historical government documents would be met with an "impermissible link" rejoinder. *See id.*

Our Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 U.S. at 673 (citations omitted); *see also Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring in part and concurring in the judgment) ("Clearly, the government can *acknowledge* the role of religion in our society in numerous ways that do not amount to an endorsement."). The Seventh Circuit's opinion fails to apprehend that the Constitution does not require complete exclusion of all references to religion from the public square.

Quite to the contrary: It effectively bans references to religion from the public square.

B. The Court Misapplied The Secular Purpose Rule

The Seventh Circuit also misapplied the rule that the State must have a secular purpose in displaying the Ten Commandments. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). *Lynch* held that a state's purpose in displaying a religious symbol is valid unless it is "motivated *wholly* by religious considerations." *Lynch*, 465 U.S. at 680 (emphasis added); *see also City of Elkhart v. Books*, 121 S. Ct. 2209, 2212 (2001) (Rehnquist, C.J., dissenting from denial of certiorari) ("In determining whether a secular purpose exists, we have simply required that the displays not be 'motivated wholly by religious considerations.'" (quoting *Lynch*, 465 U.S. at 680)). The Seventh Circuit instead evaluated whether the State's purpose in erecting the challenged monument was "primarily secular." App. 9a. Further, the court ignored the principle that federal courts reviewing Establishment Clause claims are "reluctan[t] to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned . . . ." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). Rather than defer to the Governor's stated secular purpose that the monument was to be "an integral part of the Statehouse setting, which honors the history of our state and our nation" (App. 72a), the court necessarily (and improperly) treated those statements as a sham. *See Edwards*, 482 U.S. at 586-87 ("the Court is normally deferential to a state's articulation of a secular purpose" unless it is a "sham").

The court's further pronouncement that the Ten Commandments "are historical, secular 'core values' only to those who adhere to them" (App. 9a) is wholly without foundation. The Ten Commandments' role in the

development of Western law and civilization is a matter of historical fact, not a tenet of religious belief. "Historically speaking, such are the Hebraic roots of American order, whether or not the reader of this book wholly accepts the Law and the prophets." Russell Kirk, *The Roots of American Order* 38 (1974). To deem the Ten Commandments inappropriate for a government historical display simply because it has both religious and historical import is to insist on inaccurate and incomplete public displays of history.

Finally, the court also concluded that, "since each text stands apart, the monument's physical design belies any suggestion that these texts are presented as a whole to remind viewers of the core values and legal ideals of our nation." App. 9a. But, as discussed above, the court also worried that the close association of the Bill of Rights and the 1851 Preamble with the Ten Commandments suggested endorsement. App. 12a. Had the court simply deferred to the Governor's purpose unless it was *wholly* religious, it could have avoided this contradiction.

C. Displaying The Ten Commandments Does Not Establish Religion Any More Than Other Acceptable Government Religious References

As Judge Coffey observed in dissent, "[w]here a religious symbol has a landmark foundation and meaning in the history of our country," the government may display the symbol regardless of analysis under *Lemon* or the endorsement test. App. at 23a-24a. For example, a legislature may hire a chaplain to conduct legislative prayer without explicitly satisfying *Lemon*. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)). Similarly, the "common sense of the matter"—and not necessarily rigorous analysis under *Lemon*—permits, for example, the Court to open its sessions with "God save the United States and this Honorable Court" and for the currency to bear the motto "In God We Trust."

Zorach v. Clausen, 343 U.S. 306, 312-123 (1952); *see also Marsh*, 463 U.S. at 792; App. 25a.

Such practices are acceptable without reference to *Lemon* because each "is simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792. Further, the "history and ubiquity" of these practices enables them to convey a message related to common secular culture rather than religion. *See Lynch*, 465 U.S. at 693 (O'Connor, J., concurring). For the same reasons, displaying the Ten Commandments on government property as part of a broader historical commemoration is permissible. *See Suhre v. Haywood County*, 55 F. Supp. 2d 384, 392, 397 (W.D. N.C. 1999) (recounting testimony that the Ten Commandments are "part of public life" and concluding that a historic government display of the Ten Commandments is "more secular" than other "ceremonial dieisms" [*sic*] that are permissible).

Here, Governor O'Bannon has simply decided to display the Ten Commandments on the Statehouse lawn. How is that an *establishment* of religion? As a mere "passive acknowledgement" of the role of the Ten Commandments in society, the monument here benefits religion no more than other religion-related "practices that are accepted in our national heritage." *Allegheny*, 492 U.S. at 662-63 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Justice Brennan's dissent in *Marsh* underscores this point. Even though he disapproved of legislative prayer because it is a religious act, Justice Brennan allowed that "the text of Abraham Lincoln's Second Inaugural Address which is inscribed on a wall of the Lincoln Memorial need not be purged of its profound theological content." *Marsh*, 463 U.S. at 811 (Brennan, J., dissenting). The State's monument is acceptable in the same way because it does not coerce adherence and represents "merely an acknowledge-

ment of the historical fact that the Ten Commandments served as an integral part of the foundation for our country's legal system." App. 26a. The State's monument thus poses "no greater potential for establishment of religion" than Lincoln's address—or, for that matter, the depictions of Moses holding the Ten Commandments on the south wall of the Court's courtroom and on the Supreme Court building's East Pediment. *See Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also id.* at 652-53 (Stevens, J., concurring in part and dissenting in part).

Our Founders created secular government and prohibited government establishment of religion, but the Ten Commandments profoundly influenced those Founders as well as the endurance of the Republic. The State's monument—with its seminal secular charters of state and federal government, set among numerous markers honoring the history of the State of Indiana and the Nation—merely commemorates the profound historical influence of the Commandments. Such commemorations establish no religion whatever, and so are fully consonant with the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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